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Lau Shui Jimg v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(M)-443–09 OF 2017
VERNON ONG, ABDUL RAHMAN SEBLI AND STEPHEN CHUNG JJCA
29 NOVEMBER 2018

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Criminal Procedure — Trial — Drug trafficking — Whether evidence at trial showed accused had knowledge of drugs in bag when he was arrested — Whether accused's act of transporting drugs for disposal amounted to 'trafficking' under s 2 of the Dangerous Drugs Act 1952 — Whether trial judge properly evaluated all evidence and come to proper decision

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The appellant and another person ('Li') were jointly charged in the High Court with trafficking in 688.5g of methamphetamine in the car park of a hotel in Lahad Datu, Sabah. A police party, acting on a tip-off, had arrested the duo while they were walking at the car park. When he was arrested, the appellant was carrying a brown paper bag ('the bag') which contained the impugned drugs. At the end of the prosecution's case, the trial judge acquitted and discharged Li but called on the appellant to make his defence. After hearing the appellant's defence and finding that he had failed to rebut the presumption of trafficking invoked against him under s 37(da) of the Dangerous Drugs Act 1952 ('the DDA'), and that the prosecution had proved its case beyond reasonable doubt, the trial judge convicted the appellant and sentenced him to suffer the mandatory death penalty under the DDA. In his instant appeal against the conviction and sentence, the appellant contended that the High Court erred in finding him guilty because he had no knowledge of the impugned drugs in the bag and that his defence story was consistent with the version of events given by Li in his cautioned statement ('exh D1') to police. In exh D1, Li had stated that he (Li) had gone with the appellant to Lahad Datu to buy a certain medication (ubat sabung ayam). Both of them had stayed in a common hotel room. The appellant contended that at all material times he was under the impression that the bag contained the ubat sabung ayam. In any event, the appellant argued that he should only have been convicted for possession of the impugned drugs and not for trafficking since there was no evidence that he had engaged in any act of trafficking in the said drugs.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) Notwithstanding that the prosecution had relied on the presumption under s 37(da) of the DDA and the trial judge had ruled that the

appellant had failed to rebut that presumption, in fact, based on the evidence, the appellant had travelled to Lahad Datu with the paper bag containing the said drugs intending to deliver it to someone — meaning he had intended to part with it and had the power to deal with it as if it belonged to him to the exclusion of all other persons — but he was arrested at the car park of the hotel. His activity, as such, came within the definition of 'trafficking' in s 2 of the DDA. From the facts and circumstances of the case, the appellant knew that the bag contained the drugs (see paras 20 & 38).

(2) There was no basis for the appellant to submit that the trial judge failed to consider his defence and that the defence story was consistent with exh D1. The trial judge had properly directed himself and had considered both the defence and exh D1 and found that the appellant knew of the drugs in the bag that he was carrying. The trial judge found that the appellant had failed to adduce evidence to establish his defence including failing to take any step to check that the bag contained the ubat sabung ayam — as he had asserted — and not the impugned drugs. The trial judge therefore did not err in finding that the appellant was in possession of the drugs and had failed to rebut the presumption of trafficking under s 37(da) of the DDA (see paras 22 & 36–37).

(3) The appellant was in no position to submit that his defence was consistent with exh D1. Li's averments in exh D1 contradicted the appellant's defence instead of corroborating it. In fact, in exh D1, Li distanced himself from the appellant in respect of the drugs found in the bag (see para 33).

(4) During the prosecution's case, the appellant did not refer to or put the contents of exh D1 to PW5 (who was the police officer who arrested him) or to PW8 (the investigating officer of the case). It was not put to them that the appellant's testimony was consistent with exh D1 or that exh D1 confirmed that the appellant did not bring any brown paper bag to Lahad Datu and that it was Li who had brought the bag containing the ubat sabung ayam to the hotel room. Failure by the defence to cross-examine the prosecution witness on a crucial part of the case not only went to the credibility of the appellant and his defence but amounted, in this case, to an acceptance of PW5's testimony (see paras 28–29).

[Bahasa Malaysia summary

Perayu dan seorang lagi ('Li') telah dituduh bersama di Mahkamah Tinggi kerana mengedar 688.5g methamphetamine di parkir kereta sebuah hotel di Lahad Datu, Sabah. Sepasukan polis, bertindak atas pemberi maklumat, telah menangkap kedua-dua orang tersebut semasa mereka berjalan ke parkir kereta. Apabila dia ditangkap, perayu sedang membawa beg kertas coklat ('beg tersebut') yang mengandungi dadah yang dipersoalkan. Di akhir kes

pendakwaan, hakim perbicaraan telah melepas dan membebaskan Li tetapi telah memanggil untuk pembelaannya. Selepas perbicaraan pembelaan perayu dan mendapati bahawa dia telah gagal untuk mematahkan andaian pengedaran yang digunakan terhadapnya di bawah s 37(da) Akta Dadah Berbahaya 1952 ('ADB'), dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah, hakim bicara telah mensabitkan perayu dan menjatuhkan hukuman penalti mati mandatori di bawah ADB. Dalam rayuannya terhadap sabitan dan hukuman, perayu berhujah bahawa Mahkamah Tinggi terkhilaf mendapatinya bersalah kerana dia tiada pengetahuan tentang dadah yang dipersoalkan dalam beg tersebut dan bahawa cerita pembelaannya adalah konsisten dengan versi kejadian yang diberikan oleh Li dalam kenyataan beramarannya ('eksh D1') kepada polis. Dalam eksh D1, Li menyatakan bahawa dia (Li) telah pergi ke Lahad Datu dengan perayu untuk membeli ubat tertentu (ubat sabung ayam). Kedua-dua mereka telah tinggal di sebuah bilik hotel biasa. Perayu menegaskan bahawa pada setiap masa matan dia beanggapan bahawa beg tersebut mengandungi ubat sabung ayam. Dalam apa keadaan, perayu berhujah bahawa dia sepatutnya hanya disabitkan kerana memilik dadah yang dipersoalkan itu dan bukan kerana pengedaran kerana tiada keterangan bahawa dia terlibat dalam apa-apa perbuatan pengedaran dadah tersebut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Walau apa pun pendakwaan bergantung pada andaian di bawah s 37(da) ADB dan hakim perbicaraan telah memutuskan bahawa perayu telah gagal mematahkan andaian tersebut, bahkan, berdasarakn keterangan, perayu telah pergi ke Lahad Datu dengan beg kertas yang mengandungi dadah tersebut dengan niat untuk menghantarnya kepada seseorang — bermaksud dia mempunyai niat untuk menjadi sebahagiannya dan mempunyai kuasa untuk menguruskannya seperti ia dimiliki olehnya dengan pengecualian semua yang lain — tetapi dia telah ditangkap di parkir kereta hotel tersebut. Kegiatannya, oleh itu, jatuh di bawah tafsiran 'pengedaran' dalam s 2 ADB. Berdasarkan fakta dan keadaan kes, perayu mengetahui bahawa beg tersebut mengandungi dadah tersebut (lihat perenggan 20 & 38).

(2) Tiada asas untuk perayu berhujah bahawa hakim perbicaraan telah gagal mengambil kira pembelaannya dan bahawa versi pembelaan itu konsisten dengan eksh D1. Hakim perbicaraan telah mengarahkan dirinya dengan betul dan telah mempertimbangkan kedua-dua pembelaan dan eksh D1 dan mendapati bahawa perayu mengetahui tentang dadah dalam beg yang dibawanya. Hakim perbicaraan mendapati bahawa perayu telah gagal mengemukakan keterangan untuk membuktikan pembelaannya termasuk gagal untuk mengambil apa-apa langkah untuk memeriksa yang beg tersebut mengandungi ubat sabung ayam — kerana dia menegaskan — dan bukan dadah yang dipersoalkan.

Hakim perbicaraan dengan itu tidak terkhilaf kerana mendapati bahawa perayu memiliki dadah tersebut dan telah gagal mematahkan andaian pengedaran di bawah s 37(da) ADB (lihat perenggan 22 & 36–37).

(3) Perayu bukan dalam kedudukan untuk berhujah bahawa pembelaannya adalah konsisten dengan eksh D1. Penegasan Li dalam eksh D1 bercanggah dengan pembelaan perayu dan bukan menyokongnya. Bahkan, dalam eksh D1, Li menjauhkan dirinya daripada perayu berkaitan dadah yang dijumpai dalam beg tersebut (lihat perenggan 33).

(4) Sepanjang kes pendakwaan, perayu tidak merujuk kepada atau mengemukakan kandungan eksh D1 kepada PW5 (yang merupakan pegawai polis yang menangkapnya) atau kepada PW8 (pegawai penyiasat kes itu). Ia tidak dikemukakan kepada mereka bahawa keterangan perayu adalah konsisten dengan eksh D1 atau bahawa eksh D1 mengesahkan bahawa perayu tidak membawa apa-apa beg kertas berwarna cokelat ke Lahad Datu dan bahawa ia adalah Li yang telah membawa beg yang mengandungi ubat sabung awam itu ke bilik hotel. Kegagalan oleh pihak pembelaan untuk memeriksa balas saksi pendakwaan berhubung bahagian penting kes itu bukan sahaja menjejaskan kebolehpercayaan perayu dan pembelaannya tetapi membentuk, dalam kes ini, penerimaan keterangan PW5 (lihat perenggan 28–29).]

Notes

For cases on trial in general, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5655–6314.

Cases referred to

Derrick Randall lwn Pendakwa Raya [2018] MLJU 3; [2018] 3 CLJ 212, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
Samundee Devan a/l Kerishnan Muthu v Public Prosecutor [2009] 1 MLJ 697, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 MLRA 99, FC (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Zaruna bt Yusoff lwn Pendakwa Raya [2016] 1 MLJ 860; [2016] 2 CLJ 258, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A(1)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), Schedule 1

Appeal from: Criminal Case No TWU-45A-5/10 of 2015 (High Court, Tawau)

Ram Singh (Ram Singh & Co) for the appellant.
Mohd Zain bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Stephen Chung JCA (delivering judgment of the court):

AMENDED CHARGE

[1] The appellant together with Li Lia Hoe ('the second accused') were charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') which charge was amended to read as follows:

> Bahawa kamu bersama-sama pada 27 Mac 2015 jam lebih kurang 2.00 petang bertempat di kawasan parking Hotel Silam Dynasty, di dalam negeri Sabah, dalam meneruskan niat bersama kamu telah di dapati mengedar dadah berbahaya itu Methamphetamine seberat 688.5 gram, oleh itu kamu talah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(a) akta yang sama dan dibaca bersama dengan Seksyen 34 Kanun Keseksaan.

[2] At the end of the prosecution's case, the learned judicial commissioner ('JC') found that the prosecution had established a prima facie case against the appellant who was called to enter his defence to the amended charge whereas the second accused was acquitted and discharged under the same amended charge. The prosecution did not appeal against the acquittal and discharge.

[3] In making his defence, the appellant testified under oath. At the end of the trial, the learned JC found that the defence had failed to raise a doubt on the prosecution's case and also failed to rebut the presumption under s 37(da) of the DDA. The learned JC found that the prosecution had proved its case beyond reasonable doubt against the appellant who was convicted under the amended charge and imposed the mandatory death sentence against the appellant. This is the appeal by the appellant against the conviction and sentence.

FACTS OF THE CASE

[4] On 27 March 2015, on information received about a drug case, PW5 led a team of policemen to the car park of Hotel Silam Dynasty, Lahad Datu, Sabah. Upon arrival, he positioned two of his men in the café situated in the lobby of the hotel with himself and the other policemen in the car park. After a while he saw two Chinese men came out from the hotel towards the car park. One of them was seen carrying a brown paper bag in his left hand who was

identified as the appellant. The other Chinese man was the second accused. PW5 approached them and apprehended the appellant whereas the second accused ran into the hotel where he was arrested and brought out to the car park. At the car park, in the presence of the appellant and the second accused, PW5 inspected the brown paper bag (exh P19) and found two transparent plastic packages (exhs P6 and P7), wrapped in plastic bags and aluminium foil, containing crystalline substances.

[5] The appellant and the second accused were brought to the Lahad Datu Police Station. At the police station PW5 labelled and put his signature and date on the items seized, prepared the search/seizure list (exh P15), prepared a sketch plan of the place of incident (exh P18), lodged a police report (exh P17) and handed over the items seized (see exh P16) and the appellant and second accused to the investigating officer ('IO') of the case.

[6] The IO (PW8) instructed PW3 to take photographs of the items seized (see exh P9 (1–36)). PW8 then sent the items to the Chemistry Department for analysis of the crystalline substances contained in the packages (see exh P4). A government chemist (PW1) carried out the analysis of the crystalline substances and prepared his report of the analysis (see exh P2). In his report and in his testimony in court, PW1 testified that the crystalline substances weighing 2001.5g contained 688.5g methamphetamine which is a proscribed drug under the DDA.

THE APPELLANT'S SUBMISSION

[7] In his written and oral submissions before us, counsel for the appellant submitted that there was only one issue ie the defence story was consistent with exh D1, which was a statement given by the second accused to the police recorded shortly after his arrest.

[8] It was submitted that the learned trial judge failed to consider all the evidence before him, in particular the cautioned statement exh D1. It was submitted that although the trial judge had accepted the story of the second accused who was then acquitted and discharged, he had erred in finding that he did not believe the appellant's story which was consistent with D1 that is, that he had no knowledge of the drugs in the brown paper bag because the second accused had stated in D1 that the second accused went to Lahad Datu to obtain the 'ubat sabung ayam'.

[9] Counsel for the appellant submitted that the learned trial judge had erred in law in disregarding the explanations of the appellant during the defence stage which the appellant had maintained that he had no knowledge of the drugs. It was submitted that it could not be inferred from all the

surrounding circumstances that he knew of the drugs in the brown paper bag. It was submitted that it was wrong for the trial judge to suggest that the appellant was trafficking the drugs.

[10] It was submitted that the appellant was only proved to have passive possession by invoking the presumption but there was no direct evidence of an overt act by the appellant to have committed the offence of trafficking in the dangerous drugs. It was submitted that the offence of trafficking was not proven specifically or affirmatively against the appellant and therefore it was not safe to convict him under s 39B(1)(a) of the DDA. It was submitted that based on the evidence that the appellant should only be convicted for the offence of possession and not for trafficking.

[11] It was submitted that the learned trial judge's failure to consider all the evidence required pursuant to s 182A(1) of the Criminal Procedure Code ('the CPC') including D1 whether the prosecution had proved its case beyond reasonable doubt was a serious misdirection which warranted appellate interference.

THE RESPONDENT'S SUBMISSION

[12] The respondent submitted that the appellant's story was that he went to Lahad Datu to deliver the 'ubat sabung ayam' on the instruction of PW5 and that PW5 was to meet them at the hotel but instead were arrested by PW5. It was submitted that PW5 had denied and there was no evidence that PW5 was a good friend of the appellant or that PW5 was involved in cock fighting or that he instructed the appellant to look for the 'ubat sabung ayam'.

[13] It was submitted that although the defence had put the blame on the second accused by saying that after the appellant and the second accused had checked into the hotel room that the second accused left the room and came back with the brown paper bag to the room purportedly containing the 'ubat sabung ayam' and that the appellant did not know that the brown paper bag contained the drugs, these were not put or raised during the prosecution's case but chose to do so only during the defence. It was submitted that this raised question on the credibility of the appellant and the defence case.

[14] It was submitted that since the appellant was carrying the brown paper bag from the hotel to the car park where he was arrested, if his allegation was that he did not know of the drugs, the appellant should have asked the second accused and should have checked the contents of the brown paper bag which he was carrying whether it contained the 'ubat sabung ayam' or something else. It

was submitted that the only inference that could be made was that he knew what he was bringing to Lahad Datu and that it contained dangerous drugs and that he was trafficking the drugs.

[15] In respect of the phone conversation between PW5 and the appellant, it was submitted that PW5 had denied this conversation. It was submitted that there was no evidence and no proof of such conversation as the appellant had alleged.

[16] It was submitted that the learned trail judge did not err when he found that the appellant was in possession of the drugs because he was carrying the brown paper bag containing the drugs without the need to rely on the presumption under s 37(d) of the DDA. It was submitted that the learned trail judge did not err in invoking the presumption under s 37(da) of DDA against the appellant for trafficking in the drugs.

[17] It was submitted that the defence was an afterthought and that the defence had failed to cast any reasonable doubt on the prosecution's case. It was submitted that the conviction was safe and that the appeal should be dismissed.

THE COURT'S DECISION

[18] Although counsel for the appellant had submitted that there was only one issue in this appeal namely that the learned JC had failed to consider that the defence story was consistent with exh D1, the appellant contended that he had no knowledge of the drugs in the brown paper bag. This meant that he was not in possession of the drugs. For completeness, we shall deal with this.

[19] First, the appellant did not contend that there was a break in the chain of evidence or the identity of the items and drugs seized, from the time they were seized, labelled, photographed, packed, sent to the chemist for analysis and returned to the police which were produced and tendered as exhibits through PW1 in court. It has been held that there is no necessity to call evidence to ensure that there is no break in the chain of evidence: *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75. Based on the record of appeal, there was no evidence that there was a break in the chain of evidence or that there was any doubt of the identity of the items and drugs seized. These facts were not in issue.

[20] The evidence established that at the time the appellant was arrested, he was carrying the brown paper bag containing the impugned drugs and there was no evidence of any 'ubat sabung ayam' which he alleged he was delivering to PW5. The learned JC had said that although the appellant protested that he had no knowledge of the drugs inside the paper bag he was holding, the

appellant never bother to ask or check whether it contained the 'ubat sabung ayam' or otherwise since he alleged that it was brought back to the hotel room by the second accused, which the second accused denied in his cautioned statement exh D1. The appellant never said that the second accused or someone else had asked him to carry the bag or that he did not have exclusive possession of the bag and the drugs. The evidence showed that the appellant went to Lahad Datu intending to deliver the brown paper bag to someone, meaning he intended to part with it and had the power to deal with it as if it belonged to him to the exclusion of all other persons. From the facts and circumstances of the case, the appellant knew it contained the drugs: see *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 MLRA 99.

[21] Secondly, both counsel for the appellant and the second accused did not cross-examine or challenge the testimony or findings of the chemist (PW1) as to his analysis carried out or the weight or nature of the drugs nor his report (exh P2) that the crystalline substances sent to PW1 for analysis contained 688.5g methamphetamine which is a proscribed dangerous drug under s 2 and Schedule 1 of the DDA. By failing to cross-examine PW1, they had accepted the evidence of PW1 as such: see *Samundee Devan a/l Kerishnan Muthu v Public Prosecutor* [2009] 1 MLJ 697.

[22] Based on the evidence adduced, and for the reasons given, the learned JC did not err in finding that the appellant was found to be in possession of the said drugs and that the appellant had failed to rebut the presumption under s 37(da) of the DDA.

[23] The question submitted before us was whether the defence story was consistent with exh D1. The appellant ('DW1') testified under oath that he knew Insp Mat Nor ('PW5') because he was once arrested and investigated by PW5 in Lahad Datu but was not charged for any offence. Since then they became friends and in constant communication. He said on the day before he departed for Lahad Datu from Tambunan where he resided, he received a phone call from PW5 who requested him to look for 'ubat sabung ayam' and wanted the 'ubat sabung ayam' urgently. He said as he could not find the 'ubat sabung ayam', he promised PW5 to ask a friend to look for it. While he was on his way to the airport he received another phone call from PW5 and he told PW5 that he would be going to Lahad Datu with a friend, namely the second accused. He brought his backpack and the second accused also brought a backpack which were scanned at the security at Kota Kinabalu International Airport (KKIA).

[24] After arriving at Lahad Datu, they checked into a room at Silam Dynasty Hotel which he shared with the second accused. He said the second

accused then went out for about ten minutes and came back with a brown paper bag. Subsequently he received a phone call from PW5 saying that PW5 would meet him at the hotel and upon arrival would send a SMS message for him to come out of the hotel to meet. Later he saw PW5 arrived in a car and he went to meet PW5.

[25] Regarding the bag that was brought back by the second accused, the appellant said he did not check the contents of the brown paper bag. At the material time the second accused was following him from behind and while they were walking towards PW5's car, the second accused suddenly decided to run away. He said he proceeded and entered PW5's car and told PW5 that the 'ubat sabung ayam' was in the bag and PW5 instructed him to place the bag at his feet. He said PW5 did not open the bag and he (the appellant) did not know the content of the brown paper bag.

[26] The appellant denied any knowledge of the drugs in the bag and that was why he did not up a struggle or attempted to escape upon being arrested. He reiterated that it was the second accused who had looked for the 'ubat sabung ayam'. He denied that upon his arrest he was shown the contents of the bag which he said he was only shown the contents of the bag in the police station. He also said the second accused bought and paid the air-tickets for the trip to Lahad Datu and that he did not know where the second accused had obtained the 'ubat sabung ayam'. He said since the second accused was acquitted he did not know the whereabouts of the second accused.

[27] He said exh D1 confirmed the fact that he did not have and did not bring any brown paper bag when traveling to Lahad Datu and that the second accused had admitted that the second accused brought the brown paper bag back to the room purportedly containing the 'ubat sabung ayam'.

[28] In his defence, the appellant relied on exh D1 to support or corroborate his defence. Reading the appeal record, during the prosecution case, counsel for the appellant did not refer to nor put the contents of exh D1 to PW5 who was the police officer who seized and arrested the appellant and to PW8 who was the investigating officer of this case. It was not put to them that the testimony of the appellant was consistent with exh D1. It was not put to them that exh D1 confirmed the fact that the appellant did not have and did not bring any brown paper bag to Lahad Datu and that it was the second accused who brought the bag containing the 'ubat sabung ayam' to the hotel room after he went out of the room for about ten minutes.

[29] Based on the appeal record, it was counsel for the second accused, when cross-examining PW8, who had referred to and tendered the cautioned statement of the second accused as exh D1. At that material time the appellant

and the second accused were present in court. This was the first time that D1 was referred to and produced in court by counsel for the second accused, and not by the appellant. This was well after PW5 had testified in court. D1 was never referred to PW5 nor was PW5 cross-examined on the contents of D1 when he was giving evidence. Failure by the defence to cross-examine the prosecution witness on a crucial part of the case not only went to the credibility of the appellant and his defence but amounted to an acceptance of PW5's testimony: *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.

[30] We now refer to the cautioned statement of the second accused (exh D1). In his statement the second accused referred to the appellant as 'David'. We must emphasise the fact that counsel for the appellant never challenged exh D1 nor its contents. Counsel for the appellant also did not challenge or objected to the admissibility of D1 as an exhibit or the weight to be given to it. To reiterate, at the end of the prosecution case, the second accused was acquitted and discharged of the offence and the second accused did not testify in the trial. The appellant explained that since then he did not know the whereabouts of the second accused and could not call him as his witness. However the appellant placed reliance on D1 to support his defence.

[31] In exh D1, the second accused said his intention in going to Lahad Datu was to buy 'ubat sabung ayam' in Lahad Datu and to bring it back to Sibu, meaning he was not delivering the 'ubat sabung ayam' to Lahad Datu or to someone in Lahad Datu. After arriving at Lahad Datu, they used a taxi to the hotel. After they checked into the hotel room, the appellant went out for a while and came back to the room. He did not know where the appellant went and he did not see the appellant bringing anything back to the room. He said about one hour later, he said he wanted to get something to eat and he went down to the hotel café whereas the appellant went out into the car park carrying a paper bag. He said he did not know the contents of this paper bag which the appellant was carrying. He said while he was at the café, he heard noises and he quickly ran out of the hotel because he thought it was a robbery. He was then arrested and a body search was conducted but nothing was found on him. He was brought to the police station. He said the police made a search of their hotel room but nothing was found in the room. He said when the police searched them, the appellant was carrying the paper bag containing 'syabu'.

[32] Before the trial, the second accused had given notice of alibi to the police that at the material time he was in the café and not together with the appellant in the car park. Again the appellant did not challenge the notice of alibi or that the second accused was never in the café.

[33] The averments of the second accused, instead of corroborating the defence, contradicted the testimony of the appellant as follows: (i) that PW5

had asked the appellant to look for 'ubat sabung ayam'; (ii) after they checked into the hotel room, the second accused went out for about ten minutes and brought back the brown paper bag purportedly containing the 'ubat sabung ayam' to the room; and (iii) that he and second accused went out to the car park but the second accused suddenly ran away. There was no explanation for these material contradictions. Therefore the appellant was in no position to submit that his defence was consistent with exh D1. In fact, in exh D1, the second accused distanced himself from the appellant in respect of the drugs found in the paper bag.

[34] Based on the appeal record, PW5 was cross-examined and had denied that he had phoned the appellant to look for 'ubat sabung ayam' or that he knew that the appellant would be arriving Lahad Datu via 'MASwings' on that day. Reading the appeal record, there was no evidence of this communication or that PW5 had asked the appellant to look for the 'ubat sabung ayam'. On the contrary, the second accused in exh D1 had said that he (second accused) intended to buy 'ubat sabung ayam' in Lahad Datu to bring back to Sibu. This raised doubts on the appellant's assertions that PW5 had asked him to look for the 'ubat sabung ayam'. At the time of their arrest, there was no evidence of any 'ubat sabung ayam' except for the drugs found in the brown paper bag.

[35] The appellant had testified that he brought a backpack with him to Lahad Datu and that the second accused also brought a bag containing a shirt. The appellant did not say what was inside his backpack. The evidence adduced by the prosecution was that when the appellant came out of the hotel, the appellant was seen carrying something and he was arrested at the car park. He was not arrested inside a car which contradicted his allegation that he entered the car and was arrested inside the car. The evidence showed that at that time the appellant was carrying the brown paper bag containing the drugs. In exh D1, the second accused said the appellant was carrying a paper bag which contained 'syabu'. This paper bag, which was produced in court as the brown paper bag, was tendered as exh P19. PW5 found crystalline substances inside this bag which PW1 confirmed to be methamphetamine.

[36] In his judgment, the learned JC found that the appellant was carrying the brown paper bag which was found to contain the drugs. He found that the appellant knew of the contents of the bag which he was carrying and that the appellant knew of the drugs. Accordingly the learned JC found that the appellant was in possession of the drugs. Therefore the case of *Zaruna bt Yusoff lwn Pendakwa Raya* [2016] 1 MLJ 860; [2016] 2 CLJ 258 cited by counsel cannot support the contention of the appellant. The learned JC found that based on the weight of methamphetamine was more than 50g, the prosecution was entitled to rely on the presumption of trafficking under s 37(da) of the DDA. He also found that at the end of the prosecution case the appellant had

failed to explain or rebut the presumption. On the facts and circumstances of the case, the learned JC was not plainly wrong in his findings as such.

[37] We have scrutinised the record of appeal and that the learned JC had properly directed himself and had considered the defence and exh D1. The learned JC had dealt with the defence of the appellant that PW5 had asked him to look for the 'ubat sabung ayam' and that his sole purpose of going to Lahad Datu was to deliver the 'ubat sabung ayam' to PW5 and the learned JC found that the appellant had failed to adduce evidence to establish his defence as such. The learned JC also found that although the appellant asserted that he did not know of the contents of the paper bag he was carrying, he failed to take any step to check that it contained the 'ubat sabung ayam' and not the drugs found inside. There was no basis for the appellant to submit that the learned JC had failed to consider the defence of the appellant was consistent with exh D1 and on the record of appeal, the case of *Derrick Randall lwn Pendakwa Raya* [2018] MLJU 3; [2018] 3 CLJ 212 cited by counsel is not applicable.

[38] After reading the record of appeal and in particular the defence, we agreed with the decision of the learned JC that the appellant had failed to raise a doubt on the prosecution's case. The prosecution had relied on the presumption of trafficking under s 37(da) of the DDA and the learned JC ruled that the appellant had failed to rebut the said presumption. The learned JC had also ruled that the prosecution had proved its case beyond reasonable doubt. Notwithstanding that the prosecution had relied on the presumption under s 37(da) of the DDA and the learned JC ruled that the appellant failed to rebut the presumption, in fact, based on the evidence, the Appellant travelled to Lahad Datu via 'MASwings' bringing the paper bag containing the said drugs intending to deliver it to someone but was arrested at the car park of the hotel. His activity as such came within the definition of 'trafficking' in s 2 of the DDA: see *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64.

[39] Therefore, we were unanimous in our decision that there were no merits in the appeal and that the conviction was safe. The appeal was dismissed and we affirmed the conviction and sentence imposed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar